

SHOSHONE AND ARAPAHOE TRIBES

v.

COMMISSIONER OF INDIAN AFFAIRS

IBIA 81-20-A

Decided April 16, 1982

Appeal from decision of the Commissioner of Indian Affairs requiring that per capita payments to Indian minors in institutional and foster care be considered in determining their eligibility for child welfare assistance.

Affirmed in part; vacated in part.

1. Indians: Fiscal and Financial Affairs--Indians: Social Welfare

An examination of the legislative history of 25 U.S.C. § 613 (1976) reveals that it was not intended to exempt per capita payments from being used by Indian minors to meet costs of foster home assistance or institutional care.

2. Indians: Fiscal and Financial Affairs--Indians: Guardianship--
Indians: Individual Indian Money Accounts--Indians: Social
Welfare

Under 25 CFR 104.4, disbursement from a minor's IIM account must be made in accordance with "the best interest of the minor." This regulation obligates BIA to make individualized determinations before disbursing funds for, among other things, the cost of custodial care.

APPEARANCES: Reid Peyton Chambers, Esq., Sonosky, Chambers, Sachse & Guido, for appellant Shoshone Tribe; R. Anthony Rogers, Esq., and Susan Berghoef, Esq., Wilkinson, Cragun & Barker, for appellant Arapahoe Tribe; Penny Coleman, Esq., Office of the Solicitor, Division of Indian Affairs, Department of the Interior, for appellee Commissioner of Indian Affairs. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Shoshone and Arapahoe Tribes (appellants) filed this appeal with the Board of Indian Appeals on January 19, 1981. Appellants sought review of the action taken by the Commissioner of Indian Affairs as expressed in various memoranda, including those of April 14, 1980, and December 1, 1980, requiring that the "personal financial resources" of Indian minors be used to pay the cost of placement in foster or institutional care. The administrative record in this case, which the Board received on March 27, 1981, contained a copy of a March 11, 1981, memorandum from the Acting Deputy Commissioner of Indian Affairs amending the April 14, 1980, memorandum. ^{1/} After the conclusion of briefing, the Board heard oral argument in this case on January 29, 1982.

^{1/} The Mar. 11, 1981, memorandum states:

"The policy of this Bureau is to provide social services grant assistance based upon need to otherwise eligible clientele, including children.

"Accordingly, Social Security benefits, Veterans Administration benefits and all other income accruing to children, except income exempted by Federal statute, shall be considered as a resource available to meet need. This includes all income deposited in a child's Individual Indian Money (IIM) account with the exception of per capita shares of judgment funds which shall be protected in full accordance with the provisions of 25 CFR 60.10 and 25 CFR 104.4.

"However, in those individual locations where the prevailing state standard of assistance provides for preservation of clientele minor's funds

Background

The Shoshone and Arapahoe Tribes share the Wind River Reservation in Wyoming. Tribal trust lands on the reservation are leased for oil and gas development. Pursuant to 25 U.S.C. § 613 (1976), 85 percent of the trust funds generated by these leases is "paid per capita to the members of the respective tribes in equal monthly installments on the first day of each month." Presently it appears that each Shoshone receives \$510 per month and each Arapahoe receives \$216 per month. 2/ For minors placed in foster or institutional care, these payments are held by the Bureau of Indian Affairs (BIA) in "Individual Indian Money accounts" (IIM account) as defined at 25 CFR 104.1. 3/

One hundred dollars of each per capita payment made to a minor in foster or institutional care is currently applied by BIA to the cost of custodial care, 4/ which is \$264 per child per month. 5/ The rest of each

fn. 1 (continued)

through a specified allowance limitation, the Bureau's social services program shall follow that allowance limitation.

"This policy pertaining to use of children's personal financial resources applies to all instances where this Bureau is called upon to assume financial responsibility for child placements in foster or institutional care as provided for in 25 CFR 20. The policy also applies in all instances where children are included in a general assistance application.

"This policy supercedes the Commissioner's April 14, 1980 policy memorandum, subject above. However, nothing in this policy supercedes, modifies or in any way changes the regulatory requirements of 25 CFR 20, 25 CFR 60.10 or 25 CFR 104.4."

2/ Parties' Stipulation No. 4, Jan. 8, 1982. Shoshone Indians receive larger payments because the tribal membership is less than that of the Arapahoe tribe (Tr. 1).

3/ Parties' Stipulation No. 2, Jan. 8, 1982.

4/ The Business Councils of the two tribes agreed informally to this arrangement (Tr. 3-5).

5/ Parties' Stipulation No. 4, Jan. 8, 1982.

per capita payment is retained in the minor's IIM account. The balance of the cost of foster or institutional care is paid by the BIA.

The above procedure would be significantly changed under the terms of the March 11, 1981, memorandum. 6/ Specifically, the BIA would consider all income accruing to Indian minors as a resource eligible to meet social service needs with three exceptions. Under the March 11 memorandum, the three resources not eligible to be considered by the Bureau in determining need are (1) income exempted by Federal statute, (2) per capita shares of judgment funds, and (3) the amount of funds which under applicable state law is reserved for minors in state public assistance programs. Thus, in Wyoming, where the Wind River Reservation is located, Indian minors would be entitled under exception three to accumulate \$750 free and clear from consideration by the BIA in its assessment of financial need. 7/ As to appellants, then, BIA would apparently pay the entire cost of institutional or foster care for each minor until \$750 had accumulated in that minor's IIM account. At that time, the minor would become responsible for paying the cost of care to the extent of all available resources. 8/

6/ Supra, n.1. The effectiveness of the Mar. 11, 1981, memorandum was stayed until Dec. 18, 1981, by order of the Board dated Nov. 25, 1981, pursuant to the provisions of 43 CFR 4.21(a) and (b). The stay was subsequently extended to Jan. 20, 1982 (by order dated Dec. 16, 1981), and then "until the issuance of a decision in this case or until further notice" (order dated Jan. 18, 1982).

7/ This is because Wyoming law establishes \$750 as an allowance limitation for the preservation of clientele minors' funds in the administration of its own public assistance program (Appellant's Opening Brief at 2).

8/ As previously noted the present practice at Wind River requires minors to contribute no more than \$100 of each per capita payment towards the cost of institutional or foster care assistance.

Discussion, Findings, and Conclusions

This case presents two major issues: First, whether the position set forth in the March 11, 1981, memorandum of the Acting Deputy Commissioner accurately states the applicable law; second, whether per capita payments made to minor members of the Shoshone and Arapahoe Tribes under 25 U.S.C. § 613 (1976), are "resources" available to meet "need" within the meaning of 25 CFR Part 20.

The BIA contends that the March 11 memorandum merely restates regulatory requirements found in 25 CFR Part 20. These regulations, it argues, incorporate state standards for determining an individual's need for assistance and the "resources" available to meet such need. A close reading of the regulations, however, negates this contention.

"Resources" is defined in 25 CFR 20.1(w) as "services or income available to an Indian person or family unless excluded by Federal statute for public assistance or Supplemental Security Income from being considered as income for the purpose of determining financial need." This section clearly does not incorporate state definitions of resources. The only possible provision within Part 20 that might require reference to state standards for determining an individual's "resources" is in section 20.1(s):

"Need" means the deficit between resources and money amounts necessary to meet the cost of basic items and/or special items by the applicant or recipient as established pursuant to the Social Security Act by the public welfare agency of the state in which the applicant or recipient resides and which shall be

used by the Bureau in determining the amount of financial assistance to be provided to the applicant or recipient residing in that state. [Emphasis added.]

The BIA incorrectly interprets the emphasized wording of this regulation as modifying both "resources" and "money amounts." A careful reading of the regulation reveals that the emphasized words refer to "the cost" of basic items and/or special items. That is to say, state standards (i.e., cost estimates for basic and/or special items) will be used to determine money amounts necessary to meet the defined necessities of an individual. "Need," therefore, is computed by subtracting the available "resources" of an individual from the "money amounts" necessary under state law to meet the cost of basic and/or special items of individual necessity. Consequently, the Board agrees with appellants that the plain meaning of section 20.1(s) is "that the level of support * * * shall be set by state standards" or "[i]n other words, the regulations provide that the payments for foster or institutional care, and their overall cost, shall be established by state standards" (Appellants' Reply Brief at 3).

The Board therefore rejects the Bureau's contention that the March 11 memorandum merely constitutes an "interpretive directive" regarding requirements already set forth in 25 CFR Part 20 (Appellee's Brief at 3). Instead, the memorandum impermissibly attempts to establish a new rule 9/ without following the public notice and comment procedures established under the

9/ 5 U.S.C. § 551(4) (1976) states in pertinent part: "[R]ule' means the whole or a part of an agency statement of general * * * applicability and future effect designed to implement, interpret, or prescribe law or policy."

Administrative Procedure Act, 5 U.S.C. § 553 (1976). See Morton v. Ruiz, 415 U.S. 199 (1974).

For this reason, the March 11, 1981, memorandum of the Acting Deputy Commissioner must be vacated. 10/

The next question is whether, as appellants argue, per capita payments made to minor tribal members are exempted by Federal statute from consideration in determining the extent of a minor's resources within the meaning of 25 CFR 20.1(w). Appellants base their argument on the fourth proviso in 25 U.S.C. § 613 (1976) which reads: "That said per capita payments shall not be subject to any lien or claim of any nature against any of the members of said tribes unless the business council of such member shall consent thereto in writing." Certain specific types of debts owed to the United States not relevant here are excluded from this exemption.

On its face, the above-quoted proviso of section 613 plainly conveys that per capita funds payable to tribal members are exempt from use for the payment of any form of debt or claim not otherwise permitted under the proviso or consented to by the tribal business council. Since the business councils of the appellant tribes have only consented to the use of \$100 of Indian minors' per capita funds monthly to help defray the cost of their institutional or foster care, the tribes submit that it is an obvious violation of

10/ This holding does not prohibit BIA from adopting state standards for preserving the funds of a minor in institutional or foster care if after proper rulemaking proceedings such standards are determined to be proper. (As previously noted, BIA has already used rulemaking to adopt state standards for determining the level of support which should be provided Indians eligible for assistance. 25 CFR 20.1(s).)

Federal statute for the Bureau to utilize more than \$100 of minors' funds on the Wind River Reservation to meet custodial care costs.

The broad prohibition contained in section 613, above, appears to imply that no member of the appellant tribes, including competent adults, can be required to use per capita funds to pay any debt. This interpretation strains credulity upon recognition of the fact, acknowledged by appellants, that once per capita payments are received by adult members of the tribes, the monies are not regarded as trust personalty. ^{11/} The Board cannot dismiss the possibility that Congress may not have intended section 613 to serve as the equivalent of a safety net against ordinary claims and debts which individuals, Indian or non-Indian, may be expected to incur. ^{12/}

The maxim that extrinsic aids in statutory construction may be considered only when a statute is ambiguous and not where the language is clear has given rise to several exceptions. Thus, it has been said that the "plain meaning rule * * * is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files." Federal Communications Commission v. Cohn, 154 F. Supp. 899, 910 (S.D.N.Y. 1957). The Supreme Court has declared that "even the most basic general principles of statutory construction must yield to clear

^{11/} Tr. 44. See also F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 630.

^{12/} Proceeds derived from Indian land on the Wind River Reservation by tribal members is almost entirely from per capita payments authorized by section 613. The reservation contains very few allotted lands (Tr. 7). (For a discussion of the Secretary's authority to use trust funds to pay legal debts of deceased Indians in the probate of estates, see Estate of John Joseph Kipp, 8 IBIA 30, 87 I.D. 98 (1980).)

contrary evidence of legislative intent" and found such contrary evidence in legislative history.

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974). Under the circumstances of the case before us, the Board believes it is justified in looking to the legislative history of section 613 as an aid to construction.

The legislative history on section 613 and its fourth proviso is not extensive, but is edifying. H.R. 1098, which became section 613, was introduced into the 80th Congress by Congressman Frank A. Barrett of Wyoming, for his constituents, the Shoshone and Arapahoe Tribes, and with the concurrence of the State of Wyoming. ^{13/} Hearings were held before the Subcommittee on Indian Affairs of the House Committee on Public Lands on March 15, 1947. Congressman Barrett, who was a member of the Subcommittee, and other witnesses supporting the bill testified about conditions on the Wind River Reservation. Although over \$1 million from oil and gas rentals had accrued in the tribes' joint account in the United States Treasury, ^{14/} the people lived in abject poverty, without the basic necessities of life, including food, clothing, and shelter. ^{15/} The Secretary of the Interior had on previous occasions made small per capita payments to the tribal members in order to permit them to purchase these necessities. ^{16/} Witnesses who were members of the tribal councils of each of the tribes explained that the Shoshone and Arapahoe were very individualistic people who preferred to take care of their own needs,

^{13/} Trust Funds, Shoshone and Arapaho Indian Tribes: Hearings on H.R. 1098 before the Subcomm. on Indian Affairs of the House Comm. on Public Lands, 80th Cong., 1st Sess., 1-3, 14-15 (1947) (Hearings).

^{14/} Hearings, 2, 8, 10.

^{15/} Hearings, 2, 5-6, 15-16, 22-25.

^{16/} Hearings, 10, 12, 38.

rather than depend on money from the Bureau or be subject to Federal regulations on how the money could be spent. 17/ Tribal members, the testimony shows, preferred to have a portion of their tribal money paid to the people, rather than have such funds retained in the Treasury on the possibility that someday some tribal use might be found for the money. 18/ It was admitted that some tribal members, like any other person who received unearned or large amounts of money, might waste the payments, but it was felt that these people were few and that there were other measures that might be taken to protect them and their families. 19/ The tribes asked only an opportunity to care for themselves and to "live as decent American citizens." 20/

The fourth proviso in section 613 was authored by Congressman Barrett as an amendment to H.R. 1098 21/ to ensure that normally the full amount of the per capita payment would be paid to the individual, but recourse would be available against those persons who might be wasting their money. In explaining the amendment to the Subcommittee, Congressman Barrett stated:

The purpose of my amendment is that the per capita payment shall be paid out to each of the members of the tribe without deductions unless the council, for reasons that seem proper to them, shall withhold it and apply it on loans the individual may owe on the theory that if a man is wasting his money, that he will be required to pay off his loan first before he gets his per capita payment. [22/]

17/ Hearings, 8-9, 15, 18-20, 26-27.

18/ Hearings, 8, 20-21.

19/ Hearings, 8, 15, 17, 20, 24.

20/ Hearings, 2, 7.

21/ Hearings, 20.

22/ Hearings, 7.

This statement is clarified by the testimony of the tribal witnesses that when per capita payments were made in the past, deductions had been taken for debts allegedly owed to the United States. Some of those debts, such as certain irrigation charges, were disputed when the deductions were made. Since in many cases little, if any, of the payment remained after the deductions were withheld, the people realized little benefit from the payments. 23/

The legislative history thus reveals that the fourth proviso was not intended to exempt per capita payments from legitimate debts owed by an individual. The restriction was enacted to guarantee that the individual would receive the full per capita payment so that he or she could take care of his or her own debts, like any other responsible citizen, free from restrictions imposed by the Bureau. 24/ Read in light of this legislative history, the proviso is seen to protect the initial payment owing to an individual, but not to restrict the use of money once the payment was made.

The fourth proviso in section 613, therefore, does not of itself exempt per capita payments to minor members of appellant tribes from being considered as a resource available to meet their needs. Instead, it appears that basic necessities, such as are included in the cost of foster or institutional

23/ Hearings, 38.

24/ “e are not asking for direct help from the Government. We have money, and where we have it we are asking for that money to relieve our situation.” Hearings, 25.

care, are precisely the type of expenses that were intended to be met with the per capita payments. 25/ The Board so holds. 26/

[2] This holding does not mean that all of a minor's per capita payments may be devoted to the cost of foster or institutional care. 27/ Under 25 CFR 104.4, BIA must disburse the IIM funds of a minor in accordance with "the best interest of the minor." This regulation obligates the Secretary to make individualized determinations as to what constitutes a particular minor's best interests. In some cases, a minor's best interests may be served by allowing per capita payments to accumulate for future educational needs. In others, a minor may need specialized health care. In still others, a minor with severe handicaps who may never become a self-sufficient member of society may be best served by applying a large percentage of the payments to the costs of institutional care.

The Board is not unmindful of the fact that minors in foster and institutional care need assistance in becoming fully functioning adults because of

25/ A 1956 amendment to section 613 added a provision giving the Secretary authority to protect and conserve funds payable to minors and incompetents. Act of July 25, 1956, 70 Stat. 642. This provision was deleted in 1958. Act of Aug. 8, 1958, P.L. 85-610, § 2, 72 Stat. 541. See Tr. 9-11.

26/ The Board's holding does not deprive the fourth proviso of section 613 of meaning or effect. Evaluated in light of its legislative history, Congress merely intended by this proviso to ensure that per capita funds payable to tribal members would not be subject to diminution prior to receipt by the Indian payee, except for special debts owed to the United States and unless otherwise agreed upon by the tribal business councils in writing.

27/ In their briefs appellants argued that the Commissioner of Indian Affairs was "attempting to use the property of minor trust beneficiaries to pay for services the United States is legally obligated to provide as trustee," citing White v. Califano, 581 F.2d 697 (8th Cir. 1978) (Appellants' Opening Brief at 7). As a practical matter, appellants abandoned this theory during oral argument (see Tr. 6-8; 42-44).

special problems that are often exacerbated by the absence of a stable homelife. Such individuals frequently require public assistance throughout part or all of their lives. The BIA's responsibility in integrating 25 CFR Part 20 with 25 CFR 104.4 is to determine how public assistance can best be used to give a minor an opportunity to develop his or her own potentials so that he or she can become, if possible, a self-reliant adult, able to function in society without further need for public assistance. A secondary goal, which is properly subordinated to the minor's best interests under the Department's regulatory scheme, is to reduce to the extent possible the expenditure of public assistance funds. Thus, BIA may consider per capita payments made to a minor under 25 U.S.C. § 613 (1976) as a resource available for use in paying the costs of foster or institutional care when such use is not otherwise in violation of law or detrimental to the best interests of the minor.

Pursuant to authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is ordered as follows: The March 11, 1981, memorandum issued by the Acting Deputy Commissioner of Indian Affairs to BIA Area Directors, which the Board has found seeks to promulgate standards required by law to be published in the Federal Register, is vacated; the decision of the Bureau of Indian Affairs that per capita payments received by minors of the Shoshone and Araphoe Tribes of the Wind River Reservation under authority of 25 U.S.C. § 613 may be considered as a resource eligible to meet need under the BIA's social services program is affirmed.

This decision is final for the Department.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Jerry Muskrat
Administrative Judge